IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOCKHEED MARTIN CORPORATION	:	CIVIL ACTION
	:	
v.	:	
	:	
BELL ATLANTIC DIRECTORY GRAPHICS, INC., BELL ATLANTIC NETWORK SERVICES, INC., and BELL ATLANTIC INFORMATION SERVICES	:	NO. 97-3434
	:	
BELL ATLANTIC DIRECTORY GRAPHICS, INC., and BELL ATLANTIC NETWORK SERVICES, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
LOCKHEED MARTIN CORPORATION	:	NO. 97-3438

MEMORANDUM

Giles, J. October , 1997

Lockheed Martin brings a money damages action against Bell Atlantic Directory Graphics, Inc. ("BADG"), Bell Atlantic Information Systems, Inc. ("BAIS"), and Bell Atlantic Network Services, Inc. ("BANSI") (together "Bell Atlantic"). It proceeds against BADG for breach of contract (Count I), promissory estoppel (Count II), unjust enrichment/quantum meruit (Count III), breach of covenant of good faith and fair dealing (Count IV), and breach of implied agreement to negotiate in good faith (Count V). It brings claims against BAIS and BANSI for tortious interference with contractual relations (Counts VI-VII) and prospective contractual relations (Count VIII), and for civil conspiracy (Count IX). In addition, Lockheed Martin brings

counterclaims against BADG and BANSI on these same grounds in consolidated Civil Action 97-3438 filed by these parties against it.

Now before the court are the motions of Bell Atlantic and of BADG and BANSI to dismiss Lockheed Martin's complaint and counterclaims for lost profits and breach of implied agreement to negotiate in good faith. For the reasons which follow, defendants' motions are granted, in part, and denied, in part.

FACTUAL BACKGROUND

In 1994, BADG and BANSI, subsidiaries of Bell Atlantic Corp. (Amend. Compl, ¶ 8)[1], jointly initiated a project to design, develop, and implement a custom software system to support the production of white pages directories ("the Listing Maintenance System" or "LMS") and the distribution of white pages and yellow pages directories ("the Directory Distribution System" or "DDS"). (Amend. Compl. ¶ 9). In October 1994, Lockheed Martin submitted a proposal to BANSI to perform the project ("the LMS/DDS project"). (Amend. Compl. ¶¶ 11-12).

In December 1994, Bell Atlantic Electronic Publishing, Inc. ("BAEPI"), another Bell Atlantic subsidiary not a party to this case, sought a proposal for the design, development and implementation of a custom software system to support the publication of Bell Atlantic's Yellow Pages ("the Electronic Publishing Information Center" or "EPIC"). (Amend. Compl. ¶ 13). In April 1995, Lockheed Martin submitted a combined proposal for the LMS/DDS and

1. Unless otherwise indicated, all references are to the Amended Complaint filed by Lockheed Martin in Civil Action No. 97-3434.

EPIC projects, and BANSI and BAEPI selected BADG to contract with Lockheed Martin for performance of both projects (collectively referred to as "the PRELUD/E project"). (Amend. Compl. ¶¶ 14-15).

The parties agreed to negotiate a comprehensive agreement defining their relationship ("the Definitive Agreement") after completing a requirements definition document. (Amend. Compl. ¶ 15). In the interim, the parties agreed to proceed with the development of LMS/DDS as follows:

Phase IA:	Systems Requirements Definition, Preparation of a Requirements Document, and Preparation of a Fixed Price Proposal for Phases IB and Phase II
Phase IB:	Analysis & Preliminary Design
Phase II:	Design Development and Implementation.

(Amend. Compl. ¶ 16).

On April 14, 1995, the parties executed a letter agreement ("the Letter Agreement") reflecting BADG's agreement to pay Lockheed Martin for the performance of Phase IA of the LMS/DDS project on a time and materials basis up to a Not to Exceed Price ("NTE Price"), pending the execution of a Definitive Agreement. Id. The Letter Agreement expressly disclaimed any obligation by BADG to enter into the Definitive Agreement for Phase IB or Phase II, and expressly provided that the pricing structure, purchase price, and other terms and conditions for Phase IB and Phase II remained to be agreed upon in a Definitive Agreement. Id.

As of June 1995, the parties agreed that the proposed Definitive Agreement would include a time and materials pricing structure for Phase II with incentives built in to reward cost

effective completion of the project by Lockheed Martin. (Amend. Compl. ¶ 18). Amendment One to the Letter Agreement, dated July 17, 1996, reflected the pricing structure for Phase II of for the LMS/DDS project. Id. However, the amendment also reasserted the disclaimer of any obligation by BADG to enter into a Definitive Agreement. Id.

The parties also agreed that Lockheed Martin should continue to bill on a time and materials basis up to the NTE price for the EPIC project, pending the execution of a Definitive Agreement. (Amend. Compl. ¶ 23).

In contemplation of the completion of the projects, Lockheed Martin and Bell Atlantic planned to enter into various "teaming agreements" to develop proposals for potential customers outside of the Bell Atlantic Organization, and for licensing of LMS/DDS potential software to be developed in the PRELUD/E project. (Amend. Compl. ¶¶ 45, 47). On September 15, 1995, BADG and Lockheed Martin executed a teaming agreement for a joint proposal to be submitted to Ameritech Advertising Services. (Amend. Compl. ¶ 46).

Through July 1996, Lockheed Martin continued performance on the LMS/DDS and EPIC projects. (Amend. Compl. ¶ 27).

In late March 1996, the Definitive Agreement was ready for execution. (Amend. Compl. ¶ 34). The Agreement memorialized the parties' prior understanding that work on the LMS/DDS project would be charged on a time and materials basis up to a NTE price. Id. Furthermore, the pricing provisions in the Definitive Agreement stated that Lockheed Martin would be obligated to work without compensation to complete any work remaining on the LMS/DDS project if invoices exceeded the NTE price. (Amend. Compl. ¶ 35). Lockheed

Martin objected, refused to sign the Definitive Agreement on this basis, and asked BADG to remove this provision. Id.

From April through June 1996, BADG directed Lockheed Martin to continue to perform its development work on the LMS/DDS project, to reassess the current program status, and to prepare a revised proposal for completion of the project. (Amend. Compl. ¶ 38). BADG also delivered a definitive set of requirements for the LMS/DDS system in May 1996 (Amend. Compl. ¶ 39), and requested that Lockheed Martin re-estimate the cost of completing the LMS/DDS Project. (Amend. Compl. ¶ 40).

On June 10, 1996, Lockheed Martin requested additional funding from BADG beyond the NTE level. (Amend. Compl. ¶ 41). Subsequently, BADG suspended funding authorization and payment to Lockheed Martin. (Amend. Compl. ¶¶ 41-42). BADG then refused to negotiate a mutually agreeable contract for the completion of the LMS/DDS project. (Amend. Compl. ¶¶ 42, 44). On June 28, 1996, BADG terminated Lockheed Martin's performance, dismissed Lockheed Martin's employees, and directed Lockheed Martin to leave all project work behind at BADG's offices. (Amend. Compl. ¶ 43). BADG has not paid Lockheed Martin's costs and unpaid invoices for time and materials charges on the LMS/DDS and EPIC projects. (Amend. Compl. ¶ 44).

Lockheed Martin alleges that, instead of providing effective collaboration in the development of the PRELUD/E project, various individuals in management within the Bell Atlantic organization caused BADG to breach its obligations to support the LMS/DDS project and gave inconsistent and contradictory directions, thereby impeding Lockheed Martin's progress. (Amend. Compl. ¶ 28). Lockheed Martin also claims that as a result of BADG's

failure to commit to a final set of system requirements until May 1996, project costs were increased in a manner and to an extent not originally accounted for by Lockheed Martin or BADG. (Amend. Compl. ¶ 32). Lockheed Martin asserts that it was forced, therefore, to perform extensive additional work not originally planned or anticipated. (Amend. Compl. ¶ 33).

In its first amended complaint in Civil Action No. 97-3434 and its counterclaim in Civil Action No. 97-3438, Lockheed Martin alleges that Bell Atlantic wrongfully terminated its performance of services to design, implement, and install custom software, and that BADG failed and refused to compensate Lockheed Martin for time and materials expended in support of that software development effort. It asserts that as a result of BADG's wrongful conduct, including failure to negotiate in good faith for completion of the LMS/DDS and EPIC projects, it lost substantial opportunities for new business and profits. (Compl. Amend. ¶¶ 47-48).

DISMISSAL

I. Claims for lost profits

In its complaint and counterclaim, Lockheed Martin seeks damages against Bell Atlantic for "lost profits from reasonably anticipated subsequent work from other Bell Atlantic subsidiaries, other RBOC's, and other segments of the telecommunications industry." Against Bell Atlantic, Lockheed Martin seeks lost profits where the underlying cause of action is for breach of contract (Count I) and breach of implied agreement to negotiate in good faith (Count V). Against BADG and BANSI, Lockheed Martin seeks lost profits resulting from tortious interference with contractual relations (Counts VI-VII) and prospective contractual relations

(Counts VIII), and civil conspiracy (Count IX). All claims and counterclaims against Bell Atlantic for lost profits from potential work with third parties are dismissed as speculative.

Under Pennsylvania law, lost profit damages may be established in a contract action only if there is (1) evidence to establish the damages with reasonable certainty; (2) they were the proximate consequence of the wrong; and (3) they were reasonably foreseeable. Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670, 681 (3d. Cir. 1990) (reversing jury award of lost profits damages and noting that "[p]redicting the results of business dealings that might have, but never did, occur is of course a difficult matter of proof."). Furthermore, under Pennsylvania law, the standards for establishing a lost profits claim are the same as those for an underlying action in contract or in tort. Delanty v. First Pennsylvania Bank, 318 Pa. Super. 90, 120, 464 A.2d 1243, 1258 (1983).

Courts will not allow lost profit recover as a matter of law, where such damages are based on speculation. See National Controls Corp. v. National Semiconductor Corp., 833 F.2d 491, 495-96, 98 (3d Cir. 1987) (vacating an award of lost profits that required speculation by the jury on likelihood that a third-party would have proceeded with the project and that the third-party would have chosen the plaintiff as a supplier). "[D]amages sought must be a proximate consequence of the breach, not merely remote or possible." Advent Systems Ltd., 925 F.2d at 681 (citing National Controls Corp., 833 F.2d at 496 (3d Cir. 1987)).

The Pennsylvania Supreme Court has been skeptical of claims for lost profits by a "new and untried business." Id. at 680 (citing Exton Drive-In, Inc. v. Home Indemnity Co., 436 Pa. 480, 261 A.2d 319, 324 (1969), cert. denied, 400 U.S. 819, 91 S.Ct. 36 (1970)). However, an award may be made "where such a loss was reasonably foreseeable to the parties at the time that

the contract was entered and where those damages are capable of proof of reasonable certainty." Id. at 680-81 (citing General Dynafab, Inc. v. Chelsea Industries, Inc., 301 Pa. Super. 261, 447 A.2d 958, 960 (1982) (plaintiff was able to show by commitments for orders that there was significant interest in the product before the contract breach occurred)).

Lockheed Martin alleges that "in anticipation of business opportunities with parties outside the Bell Atlantic organization, Lockheed Martin and Bell Atlantic planned to enter into various "teaming agreements" to develop joint proposals for potential customers for consulting services and for licensing of LMS/DDS software developed in the PRELUD/E project. (Amend. Compl. at ¶ 45). Lockheed Martin only points to one teaming agreement that Lockheed Martin and BADG actually executed, and that agreement was not submitted to Ameritech Advertising Services. (Amend. Compl. at ¶ 46). As Lockheed's claims for lost profits are based on anticipated business relationships which were not concrete, and a proposal for a relationship that was not submitted, Lockheed's Martin's claims for lost profits are dismissed as speculative.

II. Claim for Implied Agreement to Negotiate in Good Faith

In Count V of its complaint and counterclaim, Lockheed Martin alleges that during its negotiations with Bell Atlantic, "an agreement arose by implication of law, pursuant to which [Bell Atlantic] was obligated to negotiate with Lockheed Martin in good faith." (Amend. Compl. at ¶ 84). Lockheed Martin's claims for breach of an implied agreement to negotiate in good faith are dismissed since no such cause of action is recognized under Pennsylvania law.

No court applying Pennsylvania law has found a cause of action for breach of an implied agreement to negotiate in good faith. In fact, the Pennsylvania Supreme Court has not

determined that any cause of action for breach of a duty to negotiate in good faith even exists in the Commonwealth. Flight Systems, Inc. v. Electronic Data Systems Corp., 112 F.3d 124, 130 (3d Cir. 1997); See Channel Home Centers v. Grossman, 795 F.2d 291, 299 (3d Cir. 1986); Jenkins v. County of Schuylkill, 441 Pa. Super. 642, 652, 658 A.2d 380, 385, appeal denied, 542 Pa. 647, 666 A.2d 1059 (1995). The third circuit, however, has predicted that Pennsylvania would recognize such an action, and has held that a plaintiff states a cause of action for breach of this duty only where the facts prove that (1) both parties manifested an intention to be bound by an agreement to negotiate in good faith; (2) the terms of the agreement were sufficiently definite to be enforced; (3) consideration was conferred; and (4) the agreement was breached by bad faith conduct. Id.; SDK Investments, Inc. v. Ott, Civ. Action No. 94-111, 1996 WL 69402, p. 10 n.14 (E.D. Pa. Feb. 15, 1996). Therefore, "a breach of good faith negotiation claim can result from an enforceable agreement to negotiate in good faith under Pennsylvania law." Channel Home Centers, 795 F.2d at 298-99.

The existence of an explicit agreement to negotiate in good faith is not alleged by Lockheed Martin. Furthermore, any argument that the parties intended to be so bound is negated by the parties' written agreement that Bell Atlantic was not obligated to execute a definitive agreement or proceed with the LMS/DDS project. See Budget Marketing, Inc. v. Centronics Corp., 927 F.2d 421, 425 (8th Cir. 1991) (finding no implied duty to negotiate in good faith where specific language in proposal stated that it should not be construed as a binding agreement, and therefore "plainly disclaimed any such [implied] duty.")

Therefore, Lockheed Martin's claim and counterclaim for breach of an implied agreement to negotiate in good faith are dismissed as Lockheed Martin has failed to state a claim on which relief could be granted.

CONCLUSION

Because Lockheed Martin's first amended complaint fails to state a cause of action for lost profits from potential third party business contracts under its contract and tort claims, all such claims for lost profits are dismissed without prejudice. Since no cause of action for breach of implied agreement to negotiate in good faith is recognized under Pennsylvania law, Lockheed Martin's claim for breach of implied agreement to negotiate in good faith is dismissed with prejudice.

An appropriate order follows.

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LOCKHEED MARTIN CORPORATION	:	NO. 97-3438

ORDER

AND NOW, this day of October, 1997, upon consideration of Bell Atlantic's motion to dismiss in Civil Action No. 97-3434 (doc # 6) and in Civil Action No. 97-3438 (doc #8), and defendants' response thereto, it is hereby ORDERED that:

Bell Atlantic's motion is GRANTED, in part, and DENIED, in part. The above captioned matter is DISMISSED as to all claims and counterclaims for lost profits from potential work with third parties, and as to the claim and counterclaim for breach of implied agreement to negotiate in good faith. In all other respects, the motion is DENIED.

BY THE COURT:

JAMES T. GILES, J.